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Nos. 04-1384, 04-1034

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In The
Supreme Court of the United States

JUNE CARABELL, ET AL.,

Petitioners,

v.

ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

JOHN A. RAPANOS, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF CALVIN H. JOHNSON, PRO SE, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED BY AMICUS CURIAE

Does the United States Army Corps of Engineers have the constitutional power to protect wetlands and clean water under the power "to provide for . . . the general Welfare" given by Article I, section 8, clause 1 of the Constitution or must preservation of wetlands and clean water be within the power to suppress and channel "commerce" in section 8, clause 3?

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INTEREST OF AMICUS CURIAE

Calvin Johnson is a law professor at the University of Texas School of Law with an academic interest in the outcome of this case.[1] His resume and list of publications can be found at http://www.utexas.edu/law/faculty/cvs/chj7107_cv.pdf. He has written RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (Cambridge University 2005), which is a history of the Constitution in terms of what the Founders intended to accomplish. He offers this brief as *amicus curiae* in order to help preserve the wetlands of America and keep clean water for the future of America. He has no financial stake in the outcome of this case.

The attached *amicus curiae* brief supports the respondent, U.S. Army Corps of Engineers and respondent, United States. This brief is filed by consent of the parties. Petitioners, June Carabell and John Rapanos have filed blanket consents to *amici* briefs with the court.[2] By letter of December 19, 2005 to me, the Solicitor General consented to this brief on behalf of respondents.

SUMMARY OF ARGUMENT

Those who use originalism as a means to restrain the federal government should understand that original intent of the Constitution was to create a powerful national government able to reign over and rein in the states. There is almost no states rights in the original Constitution: the

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[1] Pursuant to Rule 37.6, I affirm that this brief was authored in full by named counsel and no one but named counsel has made a monetary contribution to the preparation or submission of the brief, except that I will apply for reimbursement of costs from funds of my employer law school dedicated to support of my academic writing without regard to content. My colleague, Douglas Laycock, made helpful comments to the brief. The views of this brief are my personal conclusions and cannot be attributed to my reviewer or to my employer, University of Texas.

[2] http://www.supremecourtus.gov/docket/04-1034.htm; http://www.supremecourtus.gov/docket/04-1384.htm.

anti-national interpretations became established only after Jefferson's election in what he rightfully called the Revolution of 1800. A return to a purified understanding of the original Constitution would be unkind to Anti-Federalism.

Congress is constitutionally empowered to protect wetlands and clean water under the power given to provide for the general welfare, as determined by sovereign Congress by vote of its elected officials through the political process. The frontiers of federal power are not here determined by the power to regulate commerce.

Article I, section 8, clause 1 of the Constitution gives the federal government the power to provide for "the common Defence and general Welfare" and clause 18, the necessary and proper clause, then allows Congress to provide for the general welfare by regulation or other means. The wording is a fair rendering of the binding Resolution of the constitutional convention, using the phrase "common Defence and general Welfare," brought over from the Articles of Confederation in order to maintain continuity. The binding Resolution provided that Congress would have all of the powers it had under the Articles of Confederation, plus the power to "legislate for the common interests of the Union." Whether a power is within the general welfare is determined by Congress, and by the political competition between Congress and the states for loyalty of the people. Congress by enactment of the Clean Water Act has determined that the protection of wetlands and clean water is for the general welfare.

The powers listed in clauses 2 through 17 of Article I, section 8 are illustrative rather than exhaustive. The Framers deleted the limitation found in Article II of the Articles of Confederation, which provided that Congress could have only the powers *expressly* delegated to it, because the limitation had proved "destructive to the Union" and even the passport system had been challenged. The federal peacetime passport is not an enumerated power, nor strictly necessary to any enumerated power, but it is within the federal power because it is for the

common defense or general welfare. The Convention and the Congress defeated several attempts to limit Congress to expressly enumerated powers. Section 8 lists activities that Congress can undertake for the common defense and general welfare, but the list is not exhaustive.

"Regulation of commerce" in clause 3 of section 8 was written to allow a series of mercantilist programs to restrict imports via deep water shipping, to give monopoly franchise to domestic shippers and to punish foreign shippers. The real original meaning of "regulation of commerce" is not strictly speaking helpful to any problem in the 21st Century.

ARGUMENT

I. Congress is empowered to protect wetlands and water by power to provide for the general welfare

The Constitution as written gives the federal government the power to provide for the common defense and general welfare by regulation or other means. Article I, section 8 clause 1, the tax clause, gives Congress the power to provide for the common defense and general welfare by taxation. Clause 18 then gives the Congress the power to enact any legislation necessary and proper to the accomplishment of the common defense and general welfare. "Common defense and general welfare" is the general standard describing the appropriate national sphere and the powers listed in clauses 1-17 of section 8 are illustrative, not exhaustive of the federal powers.

Reading the Constitution to give Congress the powers over the general welfare is consistent with our national values. We need, for example, to have the federal government with national powers when we face a nationwide epidemic of bird flu, or Ebola or some even worse new disease. We need to rein in pollution on the national level, in those cases in which states or localities decide to pollute their neighbors for self-serving reasons. Some decisions get worse when they are balkanized because balkanization

separates the beneficiaries and bearers of any cost. We should not need to find that either bird flu or pollution is some kind of "commerce." "Common Defence and general Welfare" explains the scope of the federal government that our values in fact endorse.

A. Original Intent of the Written Constitution

An accurate understanding of the original intent of the Constitution does not confine the federal government within a narrow corral. Congress has the sweeping power to provide for the general welfare and common defense.

1. The Constitutional language "to provide for the general welfare" is synonymous with the binding Resolution allowing Congress to legislate in *all* cases for the general interest

The language of the Constitution, giving authority to provide for the general welfare, was written to be a synonym for the binding Resolution adopted by the Philadelphia Constitutional Convention of 1787. The binding Resolution of the Convention included a motion offered by Gunning Bedford of Delaware on July 17, 1787 to allow Congress further "to legislate *in all Cases* for the general Interests of the Union."[3] The full scope of the federal power in the Resolution, as augmented by the Bedford's motion, was that

> "the Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate *in all Cases* for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony

[3] Gunning Bedford, *Motion of July 17, 1787*, 2 FARRAND'S RECORDS 26 (emphasis added).

> of the United States may be interrupted by the Exercise of individual Legislation Resolution."[4]

The language of the Constitution was drafted by a series of committees, which were instructed to draft language "conformable to the Resolutions passed by the Convention."[5] The drafting committees were not to effect policy, Washington wrote, but to "arrange, and draw into method & form the several matters which had been agreed to by the Convention."[6] The role of the drafting committees was simply to ensure that the Constitution was "properly dressed."[7] The first drafting committee was called the "Committee of *Detail*," denominating that its authorization was confined to details. The final drafting committee was called the "Committee on *Style*" denominating that it could not get into substance. The drafting committees were loyal to their mandate to dress the binding resolutions for the public, as indicated for instance by the fact that there were no whelps, no barking dog, and no protests that the drafting committees had breached their scriveners' duties.

The Committee on *Detail*, the first of the drafting committees, used the Articles of Confederation as a model, but deleted the "expressly delegated" limitation on Congress' powers. Article II of the Articles of Confederation had provided that the Congress would have only those powers *expressly* delegated to it. The committee took out the limitation. As Governor Edmund Randolph (Va.) explained to the Virginia Ratification Convention, the expressly delegated limitation had proved "destructive to the Union" and that *even the passport system had been*

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[4] Convention Resolutions Presented to the Committee of Detail (July 23, 1787), *in* 2 FARRAND'S RECORDS 131-32 (emphasis added).

[5] July 24, 1787, *in* 2 FARRAND'S RECORDS 106.

[6] George Washington, *Diary* (July 27, 1787), *in* 3 FARRAND'S RECORDS 65.

[7] Letter from Hugh Williamson to James Iredell (July 22, 1787), *in* 3 FARRAND'S RECORDS 61.

challenged.[8] Randolph's statement has a special weight because it was a declaration against interest and was not the kind of the understatement spin on the Constitution's impact that the Federalists sometimes used to secure ratification. Randolph had also been on the five-man Committee on Detail that took out the expressly delegated limitation.[9]

There had been a then recent controversy over the federal passport. In 1783 Pennsylvanians acting under state law authorizing captures seized the British ship *Amazon* that was carrying food and clothing for Hessian and British prisoners of war at Lancaster, Pennsylvania. Congress protested that the *Amazon* was passing under General Washington's valid passport. Eventually a committee of the Pennsylvania legislature, with advice from the Pennsylvania Supreme Court, declared that the supremacy of the federal passport rendered the Pennsylvania capture statute unconstitutional as applied to the case.[10] Federal law was supreme. The Framers intended to

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[8] Edmund Randolph, Debate in the Virginia Ratification Convention (June 24, 1788), *in* 3 ELLIOT'S DEBATES 600-601.

[9] *See* 2 FARRAND'S RECORDS 97 (Randolph on five man Committee on Detail).

[10] *See, e.g.*, Letter of Oliver Wolcott to Matthew Griswold, Jan. 22, 1783, 18 LETTERS OF DELEGATES at 601 (saying that if Pennsylvania law allows such an atrocious violation of the principles of the confederation, no one would trust the passport); John Dickinson, Report to the Pennsylvania General Assembly (Jan. 20, 1783), *in* MINUTES OF THE FIRST SESSION OF THE SEVENTH GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 783 (reporting the conflict between the passport and Pennsylvania law); Debate in Continental Congress (Feb. 20, 1783), *in* 25 JCC 906, n. 1 ("The Legislature in consequence having declared the law under which the goods were seized to be void as contradictory to the federal Constitution."); Elias Boudinot (New Jersey), *Speech to the House of Representatives* (Feb. 4, 1791), *in* 1 ANNALS 1975-1976, 1st Cong., 3d Sess. (reporting that Pennsylvania judges declared the confiscation invalid because Congress was given the power over passports); James Madison, Notes of the Continental Congress Debates (Feb. 25, 1783), *in* 19 LETTERS OF DELEGATES 68 (reporting that Madison had been told that Pennsylvania legislature

(Continued on following page)

ratify that solution. The peacetime passport is not a power enumerated in section 8 nor necessary to any enumerated power, but section 8 gives Congress that power by implication. The deletion of "expressly delegated" accomplishes and the general power to provide for the common defense and general welfare accomplishes that result.

The phrase "to provide for the common Defence and general Welfare" in section 8 comes from Article VIII of the Articles of Confederation. The phrase was added to the Constitution on September 4, very late in the Convention, by a committee of Eleven, chaired by David Brearly of New Jersey, *after* the rest of the enumerated powers of what became clause 2-18 was already in place.[11] The phrase took the place of the term, "necessities of the Union," in Randolph's first draft presented to the Committee of Detail.[12] "General welfare" is also a synonym for *exigencies of the Union* from the Annapolis Convention resolution that had empowered the Federal Convention.[13] Moreover, the Confederation Congress had empowered the Convention to propose such changes as would render the federal government "adequate to the *exigencies of Government* and the preservation of the Union."[14] The constitutional language, "to provide for the common Defence and general Welfare" is also a synonym for the binding Bedford Resolution that Congress would have the power "to legislate in all cases for the *general interests of the Union*." Use of the phrase "common defense and general welfare" from old Article VIII instead of the alternative synonyms was wise statesmanship because it maintained a continuity with the Articles of Confederation. Continuity showed that the Framers were building onto the existing federal-level

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had settled the business by deciding that Pennsylvania law was unconstitutional insofar as it interfered with passports).

[11] (Sept. 4, 1787) 2 FARRAND'S RECORDS 497.

[12] 2 FARRAND'S RECORDS 142 (emphasis added).

[13] Report of the Commissioners assembled at Annapolis Convention, 31 JCC 680 (Sept. 20, 1786).

[14] Resolution of Congress, 32 JCC 74 (Feb. 21, 1787).

government. They were not so radical as to tear out the existing fabric of government.

2. No distinction was allowed between tax and regulation.

The great goal "to provide for the common defense and general welfare" is stated within clause one of section 8, commonly called the tax and spend clause, but in the writing and in the original intent, accomplishment of the great goal is not limited to the instrumentalities of tax and spending. Once taxation is allowed for the common defense and general welfare, then the sweeping eighteenth clause allows Congress to enact "all Laws necessary and proper" to the "common Defence and general Welfare."[15] "Let the end be . . . within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[16] Once it is granted that taxation is allowed for the general welfare, pursuit of the general welfare by any other instruments follows as a matter of course.[17]

The Founders would not have denied regulation to the federal government once taxation was allowed. Regulation was considered a lesser-included power that the federal government would exercise once it commanded the paramount power of taxation. If the people will trust the

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[15] U.S. CONST. art. I, § 8, cl. 1 & 18.

[16] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.).

[17] In 1830 Madison feared that the necessary and proper clause would transform the taxation clause into a justification for achieving the common defense and general welfare by any instrument. James Madison, Memorandum not used in the letter of November 27, 1830, to Andrew Stevenson, *in* 2 THE FOUNDERS' CONSTITUTION 456, 458. Madison dreaded that interpretation, but he could see no viable stopping point once taxation was allowed for the common defense and general welfare. The interpretation that Madison dreaded in 1830 is in fact faithful to the text, to our values, and to our practices.

Congress on matters of money and revenue, Roger Sherman told the Convention, "they will trust [it] with any other necessary powers."[18] James Monroe wrote in the period before the Convention that the federal government should of course have the power to regulate commerce, but that the federal government should not get the revenue from the taxes on commerce unless the states specifically ceded that revenue.[19] From the Anti-Federalist side, taxation was the feared power of government, and "regulation" would be swept into the federal power if taxation were allowed. If Congress were granted the paramount power to tax, Anti-Federalist "Brutus" wrote, Congress would draw all other powers after it.[20] The "celebrated Montesquieu establishes it as a maxim," Centinel said, "that legislation necessarily follows the power of taxation."[21] Anti-Federalists also said that the "common Defence and general Welfare" language of clause 1 of section 8 allowed the federal legislature to "pass any law which they may think proper"[22] and to have "power co-extensive with every possible object of human legislation."[23] The "line of distinction between the power of regulating trade and

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[18] Roger Sherman, *Speech to the Federal Convention* (June 20, 1787), *in* 1 FARRAND'S RECORDS 342.

[19] Letter of James Monroe to Thomas Jefferson (Dec. 14, 1784), 22 LETTERS OF THE DELEGATES 72 (saying that Congress will distinguish between taxation and regulation of commerce, "the former unless ceded by the State to go to the State"); *see also* Letter of Charles Thomson (Pennsylvania) to John Dickinson (Dec. 25, 1780), 16 LETTERS OF THE DELEGATES 492 (disapproving of taxes for revenue, but approving of taxes "on foreign articles of luxury which we can well do without" as a "regulation of trade").

[20] Brutus I, NEW YORK J. (Oct. 18, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 415.

[21] Centinel [Samuel Bryan] I, PHILADELPHIA INDEPENDENT GAZETTEER (Oct. 5, 1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 53, 57.

[22] John Williams, Debate in the New York Ratification Convention (June 26, 1787), *in* 2 ELLIOT'S DEBATES 330; *see also id.* at 338.

[23] Letter from Richard Henry Lee to Gov. Edmund Randolph, PETERSBURG VIRGINIA GAZETTE (Dec. 6, 1787), *reprinted in* 14 DOCUMENTARY HISTORY 368.

that of drawing revenue from it" Madison explained to Jefferson, "was found on fair discussion, to be absolutely undefinable."[24]

The debaters also commonly switched the words as if "regulation" and "taxation" were near synonyms.[25] Taxation was sometimes a power within the power to regulate[26] and regulation was sometimes a subset of the power to

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[24] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 MADISON PAPERS 211.

[25] Nathaniel Gorham, Speech before the Federal Convention (July 23, 1787), *in* 2 FARRAND'S RECORDS 90 (calling New York state's tax on imports through New York harbor a "regulation of her trade"); THE FEDERALIST NO. 7, at 40 (Hamilton) (Nov. 17, 1787) (calling state taxes on imports "opportunities, which some States would have of rendering others tributary to them, by *commercial regulations*."); THE FEDERALIST NO. 12, at 78 (Hamilton) (Nov. 27, 1787) (espoused a federal tax on "ardent spirits," and calling it a "federal regulation"); Rawlins Lowndes, Debate in the South Carolina Legislature (Jan. 16, 1788), *in* 2 DEBATE ON THE CONSTITUTION 22 (calling a 1783 proposal to give Congress the power to tax imports a power "to regulate commerce"); Letter of John Jay, Secretary of Foreign Affairs to John Paul Jones (Oct. 6, 1787) *in* 33 JCC 636 (saying that Congress had no power to establish a "regulation" meaning a tax on seaman's wages to raise money for ransoming American seamen held captive in Algiers).

[26] Letter of Samuel Johnson to Stephen Mix Mitchell (Aug. 25, 1786) ("The Regulation of Trade is as essential a point to be obtain'd as the Impost, the former will eventually include the Latter and ought to be urged with as much pathos"), 23 LETTER OF DELEGATES 525; HUGH WILLIAMSON, SPEECH AT EDENTON, NORTH CAROLINA (NOV. 8, 1787), *printed in* THE DAILY ADVERTISER (NEW YORK) (Feb. 25-27, 1788) (saying that sundry regulations of commerce will give the government power not only to collect vast revenue, but also to secure the carrying trade in the hands of citizens in preference to strangers), *reprinted in* 2 DEBATE ON THE CONSTITUTION 231; THE FEDERALIST NO. 22, at 137 (Hamilton) (Nov. 27, 1787) (arguing that if the Constitution is not ratified, the states might increase their "interfering and unneighborly" *regulations* and pointing to the German *taxes* on river commerce to illustrate the danger); Letter from James Madison to Joseph C. Cabell (Sept. 18, 1828), *in* 9 MADISON WRITINGS 316, 334 (arguing that Congress may "regulate Commerce, not just to raise revenue, but also to encourage domestic manufacture").

tax.[27] The easy switches between tax and regulation may seem strange to modern ears, but they indicate that the Founders would not have drawn a legally significant line preventing federal regulation once federal tax for the same end was allowed.

3. The purpose of the Constitution was not to limit the federal government but to make it run

Removal of the "expressly delegated" limitation was also consistent with the grand purpose of the Convention that wrote it. The first purpose of the Constitution was to get the federal government revenue enough to make continuing payments on the debts of the Revolutionary War. Restoring the public credit was the overwhelming desperate need because in the next war, thought to be inevitable, the federal government would need to borrow again.[28] The Constitution is first a tax document, a pro-tax document. As James Wilson told the Convention, "It has never been a complaint against Congress that they governed overmuch. The complaint has been that they have governed too little."[29] Or as Madison had to remind Jefferson, "The evils suffered and feared from weakness in Government have turned the attention more toward the means of strengthening the [government] than of narrowing [it]."[30] The Framers removed the "expressly delegated"

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[27] Edmund Randolph, Draft of the Constitution Presented to Committee of Detail, *in* 2 FARRAND'S RECORDS 142-43 (outlining congressional "regulation of commerce" as a subdivision of the power to raise money by taxation).

[28] CALVIN JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION (Cambridge 2005).

[29] James Wilson, Speech at the Federal Convention, July 14, 1787, *in* 2 FARRAND'S RECORDS 10.

[30] Letter of James Madison to Thomas Jefferson (Feb. 4, 1790) *in* 16 JEFFERSON PAPERS 146, 150; *see also* Roger Sherman & Oliver Ellsworth to Governor Samuel Huntington, *The Report of Connecticut's Delegates to the Constitutional Convention* (Sept. 26, 1787), *in* 13 DOCUMENTARY HISTORY 471 (saying that the states' principal object in

(Continued on following page)

limitation and did not replace it because limitation of the federal government was not the problem that needed to be addressed in the crisis before them.

4. The enumeration in section 8 is not exhaustive.

Reading the Constitution properly as giving a *general* power to provide for the general welfare means that the enumerated powers of clauses 2 through 17 are *illustrative* of what Congress may do within an appropriately national sphere, but are not *exhaustive*. The appropriate maxim of construction for section 8 is not the hard-edged *expressio unius est exclusio alterius exclusio* (to express one thing excludes all others), but the gentler maxim of *ejusdem generis* (of the same class or kind). *Ejusdem generis* means that unstated items covered by a general standard must be of the same class as the enumerated items, but the enumerated items are not exclusive.[21] The phrase, "to provide for the common Defence and general Welfare," in the first clause of section 8 provides the general principle that both enumerated and implied powers must satisfy.

There was a minority view within the confines of the Convention that thought that Congress should have only enumerated powers. That position was defeated, however, whenever it came up. John Rutledge of South Carolina

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authorizing the convention was to vest some *additional* powers in Congress) (emphasis added).

[21] *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17, at 188-200 (5th ed. 1992). While *ejusdem generis* cases are often ones in which the general standard follows enumerated items, it applies as well to cases in which the general standards precede the enumerated items. *Id.* at 188. *Ejusdem generis* accomplishes "the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions . . . to everything embraced in that class, though not specifically named by the particular words." National Bank of Commerce v. Estate of Ripley, 161 Mo. 126, 131, 61 S.W. 587, 588 (1901), *cited in* SINGER, *supra*, at 189.

called for an enumeration of powers early in the Convention,[32] and South Carolina voted against both the Bedford motion and the whole binding Resolution of the Convention once the Bedford motion was added, which gave Congress the power to legislate for the general interest of the union.[33] Roger Sherman spoke in favor of an enumeration[34] and Connecticut voted against the Bedford motion, but then voted for the whole binding Resolution once the Bedford motion was added.[35] A majority of the Virginia delegation voted against the Bedford motion, but then voted for the full language of the Virginia Plan as amended by the Bedford motion. The full Resolution as amended by the Bedford motion then passed by eight to two, so that the binding Resolution of the Convention gave Congress a general power to legislate for the common interests rather than a series of petty enumerated powers.[36]

When the final language was in place, Governor Edmund Randolph, a key insider, objected that "the latitude of the general powers"[37] and the "cover of general words" allowed the Congress to swallow up the states.[38] George Mason, who refused to sign the Constitution, wanted alterations so that "the object of the National Government, [would] be expressly defined, instead of indefinite power, under an arbitrary Constitution of general clauses."[39] Randolph and Mason were objecting because the claim that Congress should have only the

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[32] May 31, 1787, 1 FARRAND'S RECORDS 53.

[33] July 17, 1787, 2 FARRAND'S RECORDS 27.

[34] *Id.* at 26.

[35] *Id.* at 27.

[36] *Id.*

[37] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787) *in* 10 MADISON PAPERS 205, 215.

[38] Edmund Randolph, *Reasons for Not Signing the Constitution* (Dec. 27, 1787) *in* 8 DOCUMENTARY HISTORY 273.

[39] George Mason, *Alterations Proposal* (Aug. 31, 1787) *in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION 251 (James H. Hutson ed., 1987).

powers expressly listed lost in the writing of the Constitution.

In the Ratification debate, the proponents of the Constitution commonly described the Constitution as giving the Federal government "all Things of common foederal Concern."[40] John Jay's *Address to the People of New York*, which was described as having an "astonishing influence in converting Antifederalists"[41] and more important than the *Federalist*[42] told the people of New York that "[t]he Convention concurred in opinion with the people that a national government *competent to every national object*, was indispensably necessary."[43] Oliver Ellsworth told the Connecticut convention that the Constitution was based on "the necessity of combining our whole force, and, as to *national* purposes, becoming one state."[44]

5. General welfare is set by the political process.

Under the original understanding, moreover, what qualifies for "common defense and general welfare" would be set by the people speaking through their elected representatives and not by an unelected court. Hamilton promised the New York Convention that the division between the federal and state government was not a constitutional question. The division, he said, is

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[40] Ezra Stiles, *Diary* (Dec. 21, 1787), *in* 3 FARRAND'S RECORDS 168-69 (describing statement of delegate Alexander Baldwin).

[41] Letter from Samuel Webb to Joseph Barrell (April 27, 1788) *quoted in Editorial Note*, 17 DOCUMENTARY HISTORY 103.

[42] Editorial Note, *id.* at 101, 107; John Kaminski, *New York: The Reluctant Pillar*, *in* THE RELUCTANT PILLAR: NEW YORK AND THE ADOPTION OF THE FEDERAL CONSTITUTION 72 (Stephen L. Schechter ed., 1985).

[43] A Citizen of New York (John Jay), *Address to the People of the State of New York* (April 15, 1787), *in* 17 DOCUMENTARY HISTORY 101, 111 (emphasis in original).

[44] Oliver Ellsworth, Debate in the Connecticut Ratification Convention (Jan. 4, 1787) *in* 2 ELLIOT'S DEBATES 186 (emphasis added).

> "the proper business of the legislation: it would be absurd to fix it in the Constitution, both because it would be too extensive and intricate, and because alteration of circumstances must render a change of the division indispensable. Constitutions should consist only of general provisions [because] they must necessarily be permanent, and . . . cannot calculate for the possible change of things."[45]

Similarly when Madison first explained the whole Constitution to Jefferson who was in Paris as minister, he argued that the line between federal and state authority would be set by a political competition. There would be "a continual struggle between the head and the inferior members," Madison explained, "until a final victory has been gained in some instances by one, in others by the other of them."[46]

Consistently, the primary argument by *Publius* in the Federalist from *both* the Madison and Hamilton side of *Publius* is that the division between the federal and state spheres would be governed by a political competition for the loyalty of the people. *Publius* (Madison) supposed in *Federalist* No. 37 that neither the local nor the general government would entirely yield to the other, " . . . and consequently that the struggle could be terminated only by compromise"[47] and in Federalist 46 he argued similarly that the people in future will become more partial to the federal than to the State governments, only if the federal level offers "manifest and irresistible proofs of a better administration."[48] *Publius* (Hamilton) argued that the greatest dangers of encroachment came from the undue advantages that the local governments had in the competition between

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[45] Alexander Hamilton, Speech to the New York Ratification Convention, June 28, 1788 *in* 2 ELLIOT'S DEBATES 364.

[46] Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 MADISON PAPERS 205, 210-11.

[47] THE FEDERALIST NO. 37, at 237 (Madison) (Jan. 11, 1788).

[48] THE FEDERALIST NO. 46, at 317 (Madison) (Jan. 29, 1788).

the levels[49] and said that it would be "vague and fallible" conjecture as to where politics would set the line.[50] *Publius* is also asymmetrical. Supremacy of federal law, enforced by federal courts, would render some State acts as "absolutely and totally and repugnant" to the Constitution.[51] The states' remedy against intrusions by the federal into the state sphere is political. As the modern Supreme Court has said, "[t]he level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all"[52] That skepticism about the role of a court to second guess the Congress on "general welfare" is consistent with the original intent.

B. The written Constitution does not limit Congress to "expressly delegated" powers, notwithstanding claims to the contrary.

1. There were erroneous claims that the Congress is limited to "expressly delegated" powers.

Proponents of the Constitution inconsistently and hypocritically also said that the Constitution gave only

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[49] THE FEDERALIST NO. 31, at 197-98 (Hamilton) (Jan. 1, 1788). *See also* THE FEDERALIST NO. 85, at 593-94 (Hamilton) (May 28, 1788) (saying that the greatest dangers of encroachment came from the undue advantages that the local governments had).

[50] THE FEDERALIST NO. 31, at 198 (Hamilton) (Jan. 1, 1788). *See also* James Wilson, Speech to the Pennsylvania Ratification Convention (Nov. 26, 1787), *in* 2 ELLIOT'S DEBATES 425 (arguing that the federal and the state governments should exercise prudence, candor, moderation and liberality because they are drawn from sources "equally pure"); Argument of Attorney General Edmund Randolph, Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 429 (1793) (arguing that allowing individuals to sue the state governments would not prostrate the states because the people and the state legislatures have control over the National government).

[51] THE FEDERALIST NO. 32, at 200 (Hamilton) (Jan. 2, 1788).

[52] South Dakota v. Dole, 483 U.S. 203, 208 n. 2 (1987) (Rehnquist, J.); Nevada v. Skinner, 884 F.2d 445, 447 (9th Cir. 1989) (citing *Dole* favorably for the proposition that the "concept of welfare or the opposite is shaped by Congress").

expressed powers. Charles Pinckney misrepresented the document before the South Carolina House saying that in the federal government, "no powers could be executed, but such as were *expressly delegated*."[53] In January 1788, Madison gave a famous version of the argument: "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[54] In a speech to a crowd in front of Independence Hall, James Wilson argued that the states had plenary powers, but the federal government did not: "The congressional authority is to be collected, not from tacit implication," he said, "but from the positive grant expressed in the" proposed Constitution. The states, he argued, could have powers not mentioned in any document. For the federal government, however, "everything which is not given, is reserved."[55]

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[53] Charles Pinckney, Speech to the South Carolina House of Representatives (Jan. 16, 1788) *in* 4 ELLIOT'S DEBATES 259 (emphasis added).

[54] THE FEDERALIST No. 45, at 313 (Madison) (Jan. 26, 1788). Madison repeated the argument, in the attempt to defeat the national bank in 1791. James Madison, Debate in the House of Representatives, 1 ANNALS 1945, 1st Cong., 3d Sess. (1791) (saying that the Constitution "is not a general grant, out of which, particular powers are excepted; it is a grant of particular powers only, leaving the general mass in other hands"); *see also* James Madison, *Address to the People of Virginia* (Jan. 23, 1799), *in* 6 MADISON WRITINGS 333-36:

> For the honor of American understanding, we will not believe that the people have been allured into the adoption of the Constitution of undefined powers. . . . [T]he preamble would admit a reading which would erect the will of Congress into a power in all cases, and therefore limited in none, [but] the objects for which the Constitution was formed were attainable only by a particular enumeration and specification of power granted to the Federal Government; reserving all others to the People, or to the States.

[55] James Wilson, *Speech to Public Meeting in Philadelphia* (Oct. 6, 1787), *in* 13 DOCUMENTARY HISTORY 339.

2. But there was no "expressly delegated" limit in text.

The proponents of the Constitution should not have said that Congress would have only powers expressly delegated to it because that misrepresented the document. Thomas Jefferson in Paris treated the argument that all powers were listed with disdain:

> To say, as Mr. Wilson does that . . . all is reserved in the case of the general government which is not given . . . might do for the Audience to whom it was addressed, but is surely *gratis dictim*, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation [Article II], which declared that in express terms.[56]

The Anti-Federalists devastated the claim that the enumerated powers were exhaustive. "Let us compare Wilson's claim that all powers not granted are reserved," said a Republican in New York, "with the sense of the framers, as expressed in the instrument itself."[57] In his first essay, Brutus noted especially the absence of the "expressly delegated" limitation and concluded from its absence that "[t]his is as much one complete government as that of New York or Massachusetts [and] has as absolute and perfect powers to make and execute all laws."[58] Brutus also labeled Wilson's argument that all which is not given is reserved as "rather specious than solid." "[T]he powers granted to the general government by this

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[56] Letter from Thomas Jefferson to James Madison (Dec. 10, 1787), *in* 10 JEFFERSON PAPERS 439, 440. LATIN WORDS AND PHRASES FOR LAWYERS (B.S. Vasan ed., 1980) translates *gratis dictim* as a "voluntary statement or assertion to which a person may not be legally bound."

[57] *A Republican I: To James Wilson, Esquire*, NEW YORK J. (Oct. 25, 1787), reprinted in 13 DOCUMENTARY HISTORY 478.

[58] Brutus I, NEW YORK J. (Oct. 18, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 414.

constitution," he said, "are complete."[60] Centinel in Philadelphia said that the Constitution did not limit Congress to powers expressly delegated by proper authority and instead made laws of Congress paramount to all State authorities.[60] "If this doctrine is true," said "A Democratic Federalist" in Pennsylvania, "it ought at least to have been clearly expressed in the plan of government."[61] Arthur Lee wrote in Virginia that "Mr. Wilson's sophism has no weight with me when he declares . . . that in this Constitution we retain all we do not give up, because I cannot observe upon what foundation he has rested this curious observation."[62]

The intentional deletion of the "expressly delegated" limitation makes it impossible to read the Constitution as if the writing limited Congress to expressly delegated powers. In our Constitution, it is the writing that binds us and not the loose lips of the proponents.

3. Loose talk does not amend the Constitution.

It should also be permissible to use arguments from the ratification debate only for the limited purpose of understanding what the Constitutional language says.

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[60] Brutus II, NEW YORK J. (Nov. 1, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 524, 526.

[60] Centinel II, PHILADELPHIA FREEMAN'S J. (Oct. 24, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 457, 460; *see also* Cincinnatus I, *To James Wilson, Esquire*, NEW YORK J. (Nov. 1, 1787) (arguing that the Articles said at the outset that what is not expressly given is reserved, but the Constitution makes no such reservation, such that the framers of the proposed constitution presumably did not mean to subject it to the same exception), *reprinted in* 13 DOCUMENTARY HISTORY 530.

[61] A Democratic Federalist, PENNSYLVANIA HERALD (Oct. 17, 1787), *reprinted in* 13 DOCUMENTARY HISTORY 387; *accord* An Old Whig II, PHILADELPHIA GAZETTEER (Oct. 17, 1787) (arguing that the powers were not enumerated or reserved by the Constitution and that Congress may judge what is necessary and proper in all cases) *reprinted in* 13 DOCUMENTARY HISTORY 402.

[62] Letter from George Lee Tuberville to Arthur Lee (Oct. 28, 1787), in 13 DOCUMENTARY HISTORY 506.

The Constitution was written in Philadelphia and once it left Philadelphia the ink was dry and the meaning of the writing was set. The ratification conventions came to adopt what amounted to a closed rule for debate on the Constitution: the conventions would recommend amendments to the first Congress, but they would not make amendments that were preconditions to ratification.[63] Thus the ratifiers were in a take-it-or-leave-it position on the Constitution without being able to influence the meaning. The unified meaning of the Constitution, the 'official idea,' was set in Philadelphia. The Philadelphia delegates argued from May to September to reach a single draft. All were bound by the written words.

After Philadelphia, however, there was never again any procedure or discipline to force a single draft or single understanding. The ratification debate extended along the entire seaboard with a population of 3 million. Reading the debates, one often wonders what document they are talking about, or at least one sees a shift on the order of "enough about you, let us talk about me." Readers in the debates commonly missed the point, or came up with interpretations that we do not find as matching the words, although that was what *they* understood to be the meaningful point to discuss. There was, as Joseph Story said, "[n]o certainty, either that different state conventions . . . gave the same interpretation to its language, or that, even in a single state convention, the same reasoning prevailed even within a majority."[64] Putting in an "expressly delegated" limitation that was not there was easy to get away

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[63] *See, e.g.*, James Madison, Speech to the Virginia Ratification Convention (June 24, 1788), *in* 3 ELLIOT'S DEBATES 618-619 (arguing that every state will propose contradictory amendments and be unable to agree on them); Convention records (June 24, 1788), *in id.* at 653-55 (Virginia convention defeats Anti-Federalist motion for amendments prior to ratification).

[64] JOSEPH STORY, 1 CONSTITUTIONAL COMMENTARY 388-389 (1833). *See also* Leonard Levy, *Ratifying Intent*, ENCYCLOPEDIA OF THE CONSTITUTION: SUPPLEMENT 40 (1991) (attacking the "utter looseness" of the argument that ratifier intent governs).

with within the loosey-goosey discipline of the ratification debates. It is a written Constitution that binds us, however, and the document was written in Philadelphia. The written Constitution does not have an expressly delegated limitation because the Framers took it out.

The records of the constitutional convention were secret until long after ratification. The convention debates are not binding authority. Still, the debates clarify our understanding of the binding written Constitution. They are persuasive as to what the Constitution means because they fit the writing. By contrast, the claim in the ratification debate that Congress had only the powers expressly delegated to it does not fit the writing and is neither authority nor persuasive.

4. The Tenth Amendment: No "expressly delegated" limit.

The Tenth Amendment, which provides that the states or the people shall have the powers not delegated to Congress, allows implied or unexpressed powers for the general welfare. The Tenth Amendment is a gesture toward the Anti-Federalists' objections to deletion of the old Article II, "expressly delegated" limitation,[65] but the amendment adopted neither old Article II nor the Anti-Federalists' proposals. Anti-Federalists in Congress objected to the proposed language of the Tenth Amendment and argued that the word "expressly" needed to be inserted. The Federalists successfully opposed the insertion. Madison

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[65] *See, e.g.*, Centinel II, PHILADELPHIA FREEMAN'S J. (Oct. 24, 1787) (objecting that the Constitution had not limited Congress to powers expressly delegated by proper authority, and had made laws of Congress paramount to all State authorities) *reprinted in* 13 DOCUMENTARY HISTORY 457, 460; Cincinnatus I, *To James Wilson, Esquire*, NEW YORK J. (Nov. 1, 1787) (observing that the Articles said that what is not expressly given is reserved, but the Constitution makes no such reservation, so the presumption is that the framers of the proposed constitution did not mean to subject Congress to the same exception), *reprinted in* 13 DOCUMENTARY HISTORY 529, 530.

recounted the history of the passport, which is not enumerated, and related the debate in the Virginia ratification convention as demonstrating Anti-Federalist acquiescence there to the passport power and to the deletion of the expressly delegated limitation.[66] "The men who drew and adopted [the Tenth] amendment," Marshall later wrote, had "experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it, to avoid those embarrassments."[67] The Tenth Amendment, accordingly, allows some unexpressed or implied powers, especially the peacetime passport.[68] The Anti-Federalists called the Amendments in the Bill of Rights, a sop or a diversion, "frothy and full of wind."[69] George Mason called them a "Farce."[70] Indeed the Tenth Amendment is a Farce, consistent with Mason's charge, because it is a symbolic truism, saying only that Congress has whatever powers that it has, whether expressed or implied.

5. "Expressly delegated" is court-made-up doctrine, not originalism.

In United States v. Hudson and Goodwin,[71] decided in 1812 the Supreme Court speaking through Jeffersonian majority, denied that there were federal common law crimes, saying that the "powers of the general Government

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[66] August 18, 1789, 1 ANNALS 790, 1st Cong., 1st Sess.

[67] McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 406-07 (1819) (Marshall, J.).

[68] *See* Charles A. Lofgren, *The Origins of the Tenth Amendment*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 331 (Ronald Collins, ed. 1980) (explaining that nothing in the Tenth Amendment undercuts the strong nationalism of the Constitution).

[69] Aedanus Burke, Aug. 15, 1789, 1 ANNALS 774.

[70] George Mason to John Mason (July 31, 1789), *in* 3 PAPERS OF GEORGE MASON 1164.

[71] 11 U.S. 32 (1812) (Johnson, William, J). *See* Gery Rowe, *The Sound of Silence*, 101 YALE L. J. 919, 936-39 (1992); BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 233-40 (2005).

are made up of concessions from the several states – what is not expressly given to the former, the latter expressly reserve."[73] *Hudson and Goodwin*'s statement of enumerated powers is hard partisan Jeffersonian ideology. As Jefferson had written the year earlier, "[t]he tenet that Congress has only the power to provide for enumerated powers, and not for the general welfare, is almost the only landmark which now divides the federalists from the republicans."[74] With the political victory of the Jeffersonians and the demise of the Federalist party, *Hudson and Goodwin*'s statement became acceptable constitutional doctrine. In the 1819 case of *McCulloch v. Maryland*,[75] Mr. Justice Marshall, the last of the great Federalists, endorsed the doctrine of limited or enumerated power, in dicta on the way to justifying a national bank: "This government is acknowledged by all to be one of enumerated powers," Chief Justice John Marshall said, and "[t]he principle, that it can exercise only the powers granted to it, [is] now universally admitted."[76] Still, while an embattled Marshall wrote dicta accepting it, the enumerated power doctrine is hard to maintain as a matter of the writing of the Constitution or its original intent. A return to the original writing of the Constitution, and to a purified version of the original meaning, would be devastating to the doctrine that Congress has no general power to provide for the common defense and general welfare, but only powers over 17 quite petty, specifically listed tools.

6. "Expressly delegated" is partisan doctrine.

Jefferson in attempting to limit Congress to the enumerated powers argued that the first clause of section

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[73] *Id.* at 33.

[74] Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 12 JEFFERSON PAPERS 71.

[75] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[76] *Id.* at 405.

8 gives Congress the power to tax "to provide for the common Defence and the general Welfare" only as a preface, to be given a more specific meaning by following clauses. It was as if the tax clause said that Congress could tax "for common defense and general welfare, *specifically* or *namely* for the powers of clauses 2-17." The subsequent enumerated powers, Jefferson argued, are to give an "exact definition" of the general welfare language.[76] In FEDERALIST NO. 41, Madison argued that the fact that the phrase, "common Defence and general Welfare," in Article I, section 8, clause 1 was not "separated by a longer pause than a semicolon" from the enumerated powers of clauses 2-17 was evidence that the enumerated powers specified what was within the general welfare.[77]

In the Articles of Confederation from which the common Defence and general Welfare language came, however, Congress' power to raise funds for the common defense and general welfare is in Article VIII, separated by three long paragraphs from the enumeration in Article IX, and without any implication that the enumeration cuts back on the general powers in Article VIII. Both Article VIII and Article IX are separate and equal empowerments of the Congress. The Constitutional language, in any event, "does not say '" to provide for the common defence, and general welfare, in manner following, viz.,' which," as

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[76] Letter from Thomas Jefferson to Albert Gallatin (June 16, 1817), *in* 12 JEFFERSON PAPERS 71-73 (referring to "the exact definition of powers immediately following" the general welfare clause).

[77] THE FEDERALIST NO. 41, at 277 (Madison) (Jan. 19, 1788). James Madison, Memorandum not used in letter to Andrew Stevenson (Nov. 27, 1830) *reprinted in* 2 THE FOUNDERS' CONSTITUTION 453, 456 ("Memorandum not used in letter to Mr. Stevenson"). Madison also spent a great deal of time worrying about whether "common defense and general welfare" might have been separated by commas or colons, rather than semicolons, from the enumeration. The resolution of the issue in the text treats all that punctuation as beside the point.

Story noted, "would be the natural expression, to indicate such an intention."[75]

7. Close reading of the text refutes the "expressly delegated" interpretation.

If we use close-reading of the text, we will conclude that the text of section 8 is more consistent with the *ejusdem generis* (illustrative) interpretation of the enumerated powers than with *expressio unius est exclusio alterius exclusio* (exhaustive) interpretation. On the face of them, the listed powers in clauses 2-17 of section 8 are not statements of the great goals of government. They are just specific programs or instruments the drafters thought they would like to do in the short run. They often have cumbersome detail. Clauses 11-15, for example, allow Congress to raise and support an army and a navy for the common defense, but over five paragraphs. It is difficult, for instance, to imply from the detail in those paragraphs that the Framers were trying to deny Congress the power to defend the country by ways not detailed. We may, for instance, need to find power to draft for the Air Force or even a space force to provide for the common defense, without shoehorning a draft for a military force in air or space into enumerated powers to provide for a military force on *land* or a naval force on *water*. They were not denying alternative methods to provide for the common defense just by listing some instruments they wanted, and some rules they wanted (no more than two-years of appropriation at once) about those instruments. The enumeration of section 8 is simply not a list of great powers or noble goals of government. The great goal of the national government is in clause 1, to provide for the common defense and general welfare.

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[75] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 908, 910, 911, at p. 371-72 (1833).

II. The Original Commerce Clause

The commerce clause was written to allow Congress to adopt a number of programs to punish imports, grant monopoly franchises and punish foreign shippers, all within the then dominant economic philosophy of mercantilism. No issue subjected to any debates has any application to problems in the twenty-first century.

Clause 3 of Article I, section 8 allows Congress to regulate commerce with foreign nations, and among the several states. The original intent of the commerce clause was to provide authority for a number of mercantilist programs, none of which have any appeal in the twenty-first century. Interstate commerce did not come up in the debates. Neither the original intent nor founding debates on the commerce clause provide any evidence of the values of the Founders helpful to resolution of issues of the general jurisdiction of the federal government.

To understand words of a historical document, one must first understand the core programs that words were written to accomplish.[79] In the original debates over adoption of the Constitution, "regulation of commerce" was used, almost exclusively, as a cover of words for specific mercantilist proposals related to deep-water shipping and foreign trade. The Constitution was written before Adam Smith, laissez faire and free trade came to dominate economic thinking. The commerce clause draws its original meaning from the preceding mercantilist tradition. The concrete programs intended to be forwarded by giving Congress the power to regulate commerce were restrictions on imports, to preserve precious specie, were restrictions on international trade to give subsidy or protection to

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[79] *See, e.g.*, Quentin Skinner, *Meaning and Understanding the History of Ideas* in MEANING AND UNDERSTANDING: QUENTIN SKINNER AND HIS CRITICS 3, 55-65, 260 (James Tully, ed., 1988).

favored domestic merchants or were penalties on foreign shippers to induce foreign nations to drop their protectionist policies. Neither trade with the Indians nor interstate commerce were debated or thought about.

In *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*,[80] I collect a sample of 161 uses of the phrase "regulation of commerce" closely tied to the debates leading to the Constitution. The samples can be summarized quickly.

A. Regulation of commerce meant first to tax it.

"Regulation of commerce," most importantly and commonly, meant taxing imports on the national level. New York had a tax on imports, called an "impost," by which it paid for purely state purposes by taxing imports through New York harbor. Connecticut and New Jersey hated the tax. In Connecticut, the proponents of the Constitution warned that those "gentlemen in New York who receive large salaries . . . know that their offices will be more insecure . . . when the expenses of government shall be paid by their constituents, than while paid by us."[81] New York had rendered Connecticut and New Jersey tributary to New York, *Publius* said, by its "commercial regulations."[82] Nationalizing the New York and other state imposts would also allow the federal government to increase the rate of tax on imports because it would prevent one state from undercutting rates by providing a lower tax and an end run around high imposts. Under the (now discredited) mercantilist economics then dominant, any suppression of imports by tax or restriction would preserve precious specie and serve the national welfare.

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[80] Calvin Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 WM. & MARY BILL OF RIGHTS J. 1 (2004).

[81] *Editorial*, CONNECTICUT COURANT (Dec. 24, 1787) *reprinted in* 15 DOCUMENTARY HISTORY 82.

[82] THE FEDERALIST NO. 7, at 40 (Hamilton) (Nov. 7, 1787).

Federal revenue was also critical to the Founders to restore the public credit so they could borrow in the next and inevitable war. While nationalizing the state imposts was the most important "regulation of commerce" issue, clause 1, the tax clause, is itself sufficient to authorize nationalization of the state imposts. Nothing is added by the commerce clause.

B. Nontax regulation of commerce referred to mean-spirited mercantilist programs that were never adopted.

Beyond tax, "regulation of commerce" was used as a reference to three restrictive mercantilist programs that never had enough political strength behind them to be seriously considered: (1) an American Navigation Act, giving Northern shippers a monopoly on the export of Southern commodities, (2) a retaliatory impost against the British to induce the British to open up the West Indies ports to American ships, and (3) port preferences requiring that all dealings with foreigners be conducted through preferred ports. None of the three programs – a monopoly for American shippers, a retaliatory impost against the British, or port preferences – were ever adopted and indeed port preferences were banned by the Philadelphia Convention itself. This is of course to be celebrated. All of the programs were mean-spirited programs that would ultimately hurt American consumers. With the demise of mercantilism as a guiding light, it would be terrible if we were bound by the Founders to adopt programs with such little true economic merit.

C. Interstate commerce was not a material issue in the constitutional debates.

There was no substantial debate or program in 1787-1788 within the category of *interstate* commerce because the Founders saw no substantial burdens on interstate commerce that needed to be discussed or corrected.[85] The

[85] *The Panda's Thumb* at 42-46.

Articles of Confederation had already prohibited a state's imposing taxes or regulations on an out-of-state American that it was unwilling to impose on its own citizens[84] and that norm was almost uniformly followed. The state imposts or taxes on imports exempted goods of American growth or produce so that by ratification there were no state taxes or burdens on interstate commerce. In the only significant reference to interstate commerce in the entire debates, Hamilton conceded that a toll on interstate commerce would require not only a repeal of the Articles' prohibition, but also an overriding of "the genius of the people of this country."[85] The Founders were concerned with fairness between the states, but the norm shows up outside of the commerce clause. As one thorough survey put it, "The thing that strikes one's attention in seeking reference to interstate commerce is their paucity."[86]

When Madison recorded the Convention's agreeing to the commerce clause, on August 16, 1787, without debate, he described the clause as the "[c]lause for regulating commerce with foreign nation and &c."[87] Regulation of commerce between the states and with the Indians shows up only within the space allowed by Madison's "&c."

The commerce clause exploded in importance from its original mercantilist meaning only because the best reading of the Constitution – a general power to provide for the common defense and general welfare – was blocked by the false supposition that clauses 2 through 17 were exhaustive. Returning to the original intent would require deciding jurisdiction of the Army Corps of Engineers under Congress' power to provide for the general welfare, and not under its mercantilist power to suppress and channel commerce.

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[84] ARTICLES OF CONFEDERATION, art. IV, 19 JCC 215.

[85] THE FEDERALIST NO. 22, at 137 (Hamilton).

[86] Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 470, 481 (1941).

[87] (Aug. 16, 1787) 2 FARRAND'S RECORDS 308.

The debates that give original meaning to the Constitution were debates about some very unattractive mercantilist programs. There were no debates about interstate commerce and no opportunity for the values of the Founders to show up there. To defer to the Founders on the scope of interstate commerce would be to defer to a constitutional nothing – they did not think about the scope of interstate commerce one way or the other. To try to base a twenty-first century government on 18th century debates on inter-state commerce is like trying to build a Cathedral on a swamp ooze, maybe on nonexistent swamp ooze.

It is, on the other hand, perfectly consistent with the values of the Founders that congressional power should expand to cover the necessities and the general interests of the union, where the sovereign Congress voted for it. Where Congress has determined that preservation of clean water and wetlands is in the general welfare, that is sufficient to make the activity constitutional.

CONCLUSION

Original intent does not confine the federal government to a narrow corral. The Constitution written allows Congress to provide for the "common Defence and general Welfare" of the United States. Under this standard, the United States Army Corps of Engineers may under the Clean Water Act deny a permit to build a multi-unit condominium which would cause extreme damage to the wetlands and pollute waters, and may punish illegal dumping and filling. Protecting the water of the country from pollution falls squarely under a national power to protect the general welfare of the country.

For these reasons the decisions of the Sixth Circuit in Carabell v. Army Corps of Engineers and Rapanos v. United States should be affirmed.

Respectfully submitted,

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